# Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-77–12 OF 2011(W)
ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, ABDULL HAMID EMBONG, AHMAD MAAROP AND ZAINUN ALI FCJJ
5 NOVEMBER 2012

*Civil Procedure — Appeal — Leave — Suit in High Court — Order of discovery of documents in possession — Show cause notice — Failure to comply or lodge appeal — Striking out of suit — Filing afresh of suit with same set of facts — Striking off of fresh suit — Whether suit abuse of court process — Whether non-compliance of O 34 r 2(1) of the Rules of the High Court 1980 occasioned — Whether Principle of Birkett v James applicable*

This was an appeal by the appellant ('defendant') against the decision of the Court of Appeal in allowing the respondent's ('plaintiff') appeal against the decision of the High Court which had struck out the respondent's writ and statement of claim. The plaintiff had commenced a suit against the defendant in the High Court. The defendant had applied for discovery of documents in the 2006 suit and the plaintiff was ordered to file an affidavit disclosing all documents in its possession. However, the plaintiff did not comply nor lodged any appeal against that order of court in the 2006 suit. Since no action was taken by the plaintiff, the court issued a show cause notice to the plaintiff in the 2006 suit and the 2006 suit was struck out upon the hearing of the said notice. The deputy registrar concluded that the plaintiff's delay in proceeding with the further prosecution of the 2006 suit was an intentional and contumelious default, making it ground enough to be struck out. The plaintiff then proceeded to appeal against the deputy registrar's decision to the judge in chambers but this application was dismissed. Instead of filing an appeal against the learned judge's decision, the plaintiff chose to file the present suit, which was based on the same set of facts. The defendant then filed an application for the writ and statement of claim of the plaintiff to be struck out with costs and the application was allowed. The High Court judge held that the second suit was an abuse of the process of the court by the plaintiff. However, the decision was reversed on appeal to the Court of Appeal. The Court of Appeal held that the striking out order by the deputy registrar came about as a result of the court, on its own motion issuing a show cause notice to the plaintiff not in relation to delay in complying with the discovery order, but for non-compliance with O 34 r 2(1) of the Rules of the High Court 1980 ('RHC'). The Court of Appeal also held that the filing of the 2010 suit by the plaintiff did not amount to an abuse of the process of the court. Aggrieved by the decision of the Court of Appeal, the defendant sought for leave to appeal to the Federal Court and leave

was granted. The issues that arose before the present court were whether the *Birkett v James* principle was applicable where the High Court acted on its own motion to strike out an action under the new O 34 of the RHC; and whether the second suit was an abuse of the process of the court.

**Held,** allowing the appeal with costs:

(1) The principle laid down in *Birkett v James* had no application as O 34 of the RHC ('O 34') purpose on pre-trial case management where the court no longer left it to the parties to move the litigation at their own pace but assumed the role of setting the timetable for progress of the case (see para 8).

(2) Even in the case of *Birkett v James*, it was conceded that a second suit filed after the first suit was dismissed for breach of a peremptory order would be an abuse of the court's process and liable to be dismissed. There was clearly an abuse of the process of the court by the plaintiff in filing the second suit. It was conceded even by the plaintiff that it was in breach of a peremptory order to give discovery in the first suit (see para 17).

(3) In the present case, no affidavit was filed by the plaintiff to explain the failure to comply with the discovery order or to explain the delay in progressing the case. It was of importance for an affidavit to explain non-compliance or delay be filed in order for the court to evaluate the case. It was unacceptable for the plaintiff to give a statement from the Bar offering an explanation (see para 19).

(4) The plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the plaintiff accepted the correctness of the decision to dismiss its suit. Further, the failure to appeal has itself been recognised as an abuse of process because the second suit would be construed as an attempt to circumvent the appeal procedure (see para 20).

(5) The plaintiff did not appeal against this discovery order and had therefore accepted its terms in full. The discovery order had made the progress of the first suit conditional upon the plaintiff giving discovery. The Court of Appeal failed to appreciate this fact and therefore drew an artificial distinction between the delay factor and the disobedience factor. On this mistake alone, the judgment of the Court of Appeal cannot stand. The Court of Appeal was clearly wrong in taking the restricted view of the High Court's jurisdiction under O 34 of the RHC. Once the High Court was seized with jurisdiction under O 34 of the RHC it would be required to consider all the factors causing delay. Continuing breach of the peremptory order to give discovery resulted in the action remaining stagnant and not progressing (see paras 22–24).

**[Bahasa Malaysia summary**

Ini merupakan rayuan oleh perayu ('defendan') terhadap keputusan Mahkamah Rayuan yang telah membenarkan rayuan responden ('plaintif') terhadap keputusan Mahkamah Tinggi yang telah membatalkan writ dan pernyataan tuntutan responden. Plaintif telah memulakan saman terhadap defendan di Mahkamah Tinggi. Defendan telah memohon untuk penzahiran dokumen dalam saman 2006 dan plaintif telah diperintahkan untuk memfailkan afidavit menzahirkan kesemua dokumen dalam milikannya. Walau bagaimanapun, plaintif tidak mematuhi mahupun membuat apa-apa rayuan terhadap perintah mahkamah dalam saman 2006. Oleh kerana tiada tindakan diambil oleh plaintif, mahkamah mengeluarkan notis tunjuk sebab kepada plaintif dalam saman 2006 dan saman 2006 telah dibatalkan selepas pendengaran notis tersebut. Timbalan pendaftar memutuskan bahawa kelewatan plaintif dalam meneruskan pendakwaan guaman 2006 merupakan keingkaran sengaja dan bersifat celaan, menjadikan ia alasan yang cukup untuk dibatalkan. Plaintif kemudiannya merayu terhadap keputusan timbalan pendaftar kepada hakim dalam kamar tetapi permohonan ini ditolak. Plaintif sepatutnya memfailkan rayuan terhadap keputusan hakim yang bijaksana, tetapi memilih untuk memfailkan saman hadir, yang berdasarkan pada set fakta yang sama. Defendan kemudian memfailkan permohonan untuk writ dan penyata tuntutan plaintif dibatalkan dengan kos dan permohonan tersebut dibenarkan. Hakim Mahkamah Tinggi memutuskan bahawa saman kedua merupakan penyalahgunaan proses mahkamah oleh plaintif. Walau bagaimanapun, keputusan tersebut telah diakas atas rayuan kepada Mahkamah Rayuan. Mahkamah Rayuan memutuskan bahawa perintah pembatalan oleh timbalan pendaftar adalah disebabkan mahkamah, atas kehendaknya sendiri mengeluarkan notis tunjuk sebab kepada plaintif tidak berhubungan dengan kelewatan dalam mematuhi perintah penemuan, tetapi bagi ketidakpatuhan A 34 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah Rayuan juga memutuskan pemfailan saman 2010 oleh plaintif tidak terjumlah kepada penyalahgunaan proses mahkamah. Terkilan dengan keputusan Mahkamah Rayuan, defendan memohon kebenaran untuk merayu kepada Mahkamah Persekutuan dan kebenaran diberikan. Isu-isu yang timbul di hadapan mahkamah adalah sama ada prinsip *Birkett v James* terpakai di mana Mahkamah Tinggi bertindak atas kehendaknya sendiri untuk membatalkan tindakan di bawah A 34 KMT yang baru; dan sama ada saman kedua merupakan penyalahgunaan proses mahkamah.

**Diputuskan,** membenarkan rayuan dengan kos:

(1) Prinsip yang ditetapkan dalam kes *Birkett v James* tidak terpakai kerana tujuan A 34 KMT ('A 34') ke atas pra-perbicaraan pengurusan kes di mana mahkamah tidak lagi menyerahkan kepada pihak-pihak untuk menggerakkan litigasi mengikut masa mereka sendiri tetapi memegang peranan menetapkan jadual untuk progres kes itu (lihat perenggan 8).

(2) Malah dalam kes *Birkett v James*, ia diperakui bahawa saman kedua difailkan selepas saman pertama telah ditolak kerana melanggar perintah muktamad merupakan suatu penyalahgunaan proses mahkamah dan boleh ditolak. Terdapat suatu penyalahgunaan proses mahkamah yang jelas oleh plaintif dalam memfailkan saman kedua. Ia telah diperakui oleh plaintif bahawa dia melanggar perintah muktamad untuk penzahiran dalam saman pertama (lihat perenggan 17).

(3) Dalam kes ini, tiada afidavit yang difailkan oleh plaintif untuk menjelaskan kegagalan untuk mematuhi perintah penemuan atau menjelaskan kelewatan dalam progres kes tersebut. Adalah penting afidavit menjelaskan ketidakpatuhan atau kelewatan agar difailkan dalam usaha untuk mahkamah menilai kes. Ia tidak boleh diterima bagi plaintif untuk memberi kenyataan dari Bar menawarkan penjelasan (lihat perenggan 19).

(4) Plaintif tidak merayu terhadap keputusan yang arif hakim dalam membatalkan saman pertama. Kegagalan untuk merayu bermakna bahawa plaintif menerima ketepatan keputusan untuk menolak saman. Di samping itu, kegagalan untuk merayu telah dengan sendirinya diiktiraf sebagai penyalahgunaan proses kerana saman kedua akan ditafsirkan sebagai satu usaha untuk memintas prosedur rayuan (lihat perenggan 20).

(5) Plaintif tidak merayu terhadap perintah penzahiran ini dan dengan itu telah menerima termanya sepenuhnya. Perintah penzahiran telah membuatkan progres saman pertama tertakluk kepada plaintif memberi penzahiran. Mahkamah Rayuan gagal untuk menimbangkan fakta ini dan oleh itu membuat perbezaan antara faktor kelewatan dan faktor ketidakpatuhan. Atas kesilapan ini sahaja, penghakiman Mahkamah Rayuan tidak terpakai. Mahkamah Rayuan jelas salah dalam mengambil pandangan terhad bidang kuasa Mahkamah Tinggi di bawah A 34 KMT. Setelah Mahkamah Tinggi ditarik balik daripada bidang kuasa di bawah A 34 KMT, ia akan dikehendaki untuk mempertimbangkan kesemua faktor-faktor yang menyebabkan kelewatan. Kemungkiran berterusan perintah muktamad supaya memberi penzahiran mengakibatkan tindakan kekal dan tidak berganjak (lihat perenggan 22–24).]

**Notes**

For cases on leave, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1276–1291.

**Cases referred to**

*Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685; [1997] 3 CLJ 51, HC (refd)

*Axa Insurance Co Ltd v Swire Fraser Ltd* [2001] CP Re 17, CA (refd)

*Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926, CA (refd)
*Birkett v James* [1977] 2 All ER 801, HL (refd)
*Hong Leong Assurance Bhd v American Home Assurance Co Malaysia* [2008] 8 MLJ 547, HC (refd)
*Janov v Morris* [1981] 3 All ER 780, CA (refd)
*Lim Oh & ors v Allen & Gledhill* [2001] 3 MLJ 481, FC (refd)
*Pembinaan dan Pemaju Mahajiwa (Selangor) Sdn Bhd v ASM Development Sdn Bhd (formerly known as Sobena Maju Sdn Bhd)* [2003] 4 MLJ 633; [2003] 4 CLJ 213, FC (refd)
*Sim Lim Finance Ltd v Highlight Industry Pte Ltd & Ors* [1987] 1 MLJ 182 (refd)
*Sunway PMI-Pile Construction Sdn Bhd v Pembenaan Chan & Chua Sdn Bhd* [2002] 7 MLJ 538, HC (refd)
*Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301, FC (refd)
*Toh Hock Thye v Toh Chwee Biow* [1982] 1 MLJ 152, FC (refd)

**Legislation referred to**

Limitation Act 1953
Rules of the High Court 1980 O 34, O 34 r 1(3), 2(1), 8(2), 34(3)

**Appeal from:** Civil Appeal No W–02(1M)(NCC)–3146 of 2010 (Court of Appeal, Putrajaya)

*Cyrus V Das (Richard WG Lee with him) (Richard Lee) for the appellant.*
*Sulaiman Abdullah (Abd Rashid Ismail, Alan Wong, Cliff Siow and Megat Abdul Munir with him) (Zain Megat & Murad) for the respondent.*

**Zulkefli CJ (Malaya) (delivering judgment of the court):**

## INTRODUCTION

**[1]** This is an appeal by the appellant against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court at Kuala Lumpur allowing the appellant's application for the writ and statement of claim of the respondent be struck out with costs. Before the High Court the appellant was the defendant and the respondent was the plaintiff. We shall refer to the parties as they were before the High Court.

## BACKGROUND FACTS

**[2]** The relevant background facts of the case may be summarised as follows:

(a) the plaintiff had filed a suit against the defendant vide Kuala Lumpur

High Court suit D1-22–270 of 2006 ('the 2006 suit') based on the same facts and for the same relief as set out in the present Suit D-22NCC-1071 of 2010 ('the 2010 suit');

(b) pursuant to an application by the defendant for discovery of documents in the 2006 suit, an order of court had been issued against the plaintiff on 31 October 2008 whereby the plaintiff was to file an affidavit to disclose all documents in its possession within a stipulated time;

(c) the plaintiff did not lodge any appeal against that order of court in the 2006 suit and neither did the plaintiff comply with the said order. On 25 August 2009 the court on its own volition issued to the plaintiff a 'notice to show cause' in the 2006 suit as to why the suit should not be struck out as no further action had been taken by the plaintiff on the file;

(d) on 15 September 2009, the deputy registrar proceeded to strike out the 2006 suit upon the hearing of the notice to show cause. Before the deputy registrar, the plaintiff counsel's explanation from the Bar as regards the delay in prosecuting the action was rejected. The deputy registrar in her conclusion held expressly that the plaintiff's delay in proceeding with the further prosecution of the 2006 suit was an intentional and contumelious default and that was ground enough for the suit to be struck out;

(e) the plaintiff appealed against the deputy registrar's decision to the judge in chambers. The learned judge dismissed the appeal. The plaintiff did not file any appeal against the learned judge's decision but chose instead to file this present suit, which for all intents and purposes was a fresh action for the same relief based on the same set of facts. The plaintiff maintained that as no statutory limitation had set in, they were entitled to bring this fresh proceeding against the defendant; and

(f) the defendant then filed an application for the writ and statement of claim of the plaintiff to be struck out with costs.

## FINDINGS OF THE HIGH COURT

**[3]** On 4 October 2010, the High Court allowed the defendant's application and ordered that the writ and statement of claim in this present suit to be struck out with costs of RM7,500. The learned judge of the High Court ruled that the second suit was an abuse of the process of the court by the plaintiff. The learned judge of the High Court, inter alia, held that pursuant to O 34(3) of the Rules of High Court 1980 ('RHC 1980') and its inherent jurisdiction, the court had the power to dismiss an action for want of prosecution. The learned judge agreed with the finding of the deputy registrar that the delay of the plaintiff in not prosecuting the 2006 suit was the result of an intentional and contumelious default or conduct of the plaintiff. The learned judge of the High

Court further held that the fact that the 2010 suit was filed well before the expiry of the limitation period is of no consequence.

FINDINGS OF THE COURT OF APPEAL

**[4]** On 3 March 2011, the Court of Appeal allowed the plaintiff's appeal. The Court of Appeal amongst others held that the striking out order by the deputy registrar came about as a result of the court, on its own motion issuing a show cause notice to the plaintiff not in relation to delay in complying with the discovery order, but for non-compliance with O 34 r 2(1) of the RHC 1980. The Court of Appeal also held that the default on the part of the plaintiff in not complying with the discovery order within the specified period of time bears no relationship to the default on the part of the plaintiff to comply with O 34 r 2(1) of the RHC 1980 which was the subject matter of the notice to show cause. For this reason the Court of Appeal took the view that the filing of the 2010 suit by the plaintiff did not amount to an abuse of the process of the court.

LEAVE TO APPEAL

**[5]** Aggrieved by the decision of the Court of Appeal, the defendant sought for leave to appeal to the Federal Court. The Federal Court granted the defendant leave to appeal on the following questions of law:

(a) where the plaintiff's first suit was struck out in circumstances where the plaintiff was in breach of a peremptory order or an order to give discovery whether the plaintiff could institute a second suit on the same grounds as the first suit on the basis that limitation had not set in;

(b) where the plaintiff had failed to appeal over the striking out of its first suit and further its failure to comply with the discovery order remained unexplained, whether the commencement of a second suit on the same grounds as the first suit was an abuse of process;

(c) whether the principle in *Birkett v James* [1977] 2 All ER 801 (HL) of a distinction between striking out on account of delay or on account of contumelious conduct is relevant where the plaintiff was put on a timetable to give discovery, and where the action was stayed in the interim and the plaintiff had failed to comply with the same; and

(d) whether the principle in *Birkett v James* or the Singapore case of *Sim Lim Finance Ltd v Highlight Industry Pte Ltd & Ors* [1987] 1 MLJ 182 relied on by the plaintiff is relevant where the striking out was pursuant to 'notice to show cause' issued by the court itself on account of the action being stayed pending discovery and no further action was being taken by the plaintiff.

DECISION OF THIS COURT

**[6]** Before us learned counsel for the plaintiff submitted that the decision of the Court of Appeal is correct and should be affirmed. He argued in support of the decision of the Court of Appeal essentially on the following grounds:

(a) the O 34 of the RHC 1980 merely governs the pre-trial case management process and it is silent on the fate of the action struck out pursuant thereto;

(b) the principles in relation to whether a second suit is to be allowed is well settled and that a fresh suit will only be prohibited when the earlier action was struck out for intentional and contumelious default;

(c) the Court of Appeal was correct in making the finding that the filing of the second action did not amount to an abuse of process as the earlier action was struck out pursuant to O 34 r 2(1) of the RHC 1980 concerning pre-trial case management; and

(d) the merits of the earlier action had never been dealt with when the matter was struck out and the second action herein was filed within the limitation period prescribed under the Limitation Act 1953.

**[7]** Having heard the submission of both the parties we agree with the contention of learned counsel for the defendant that based on the four leave questions posed before us there are in fact only two principal issues to be decided by this court namely:

(a) whether the *Birkett v James* principle is applicable where the High Court acts on its own motion to strike out an action under the new O 34 of the RHC 1980; and

(b) whether the second suit which was commenced in identical terms against the defendant is an abuse of the process of the court.

**[8]** We shall first deal with the first issue. The crux of the argument advanced for the plaintiff is that under the *Birkett v James* ratio as applied in cases like *Sim Lim Finance v Highlight Industries* in Singapore, a plaintiff is entitled to file a second suit in identical terms against the same defendant if limitation had not set in and if he had not been guilty of contumelious conduct. With respect we are of the view that the principle laid down in *Birkett v James* has no application for O 34 of the RHC 1980 ('Order 34') purposes on pre-trial case management where the court no longer left it to the parties to move the litigation at their own pace but assumed the role of setting the time-table for progress of the case.

**[9]** It is to be noted O 34 was a new addition to the RHC 1980 made in 2000 (see PU(A) 342/20001). It was amended again in 2009 (see PU(A)

237/20091). It provided for a radical change in approach to the prosecution of a case in court. An early recognition of this new regime under O 34 where the court takes a proactive role in moving the pace of litigation was made by the Federal Court when His Lordship Mohd Noor Ahmad FCJ observed in obiter in *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465 at p 473; [2004] 2 CLJ 301 at p 312 as follows:

> The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

**[10]** On the question of whether the *Birkett v James* principle applied to O 34, useful reference can be made to the judgment of Augustine Paul J (as he then was) in *Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685 at p 695; [1997] 3 CLJ 51 at pp 56–58 when considering the predecessor rule, which was O 34 r 8(2). Firstly referring to the *Birkett v James* principle he said:

> It must be observed that the principles were contemplated as being applicable by the English Courts only when the application to dismiss an action for want of prosecution is made by the defendant as their rules do not have a provision equivalent to our r 8(2) …

Secondly, he held the *Birkett v James* principles as not being appropriate where the court is acting on its own motion:

> A matter of considerable significance is the extent to which the principles apply when the proceeding to dismiss the action is initiated by the court itself as authorised under r 8(2).
>
> In my opinion, and with respect, the rationale empowering the dismissal of an action for want of prosecution at the instance of the court must as of necessity involve different considerations from that applicable when a similar proceeding is initiated by a defendant … To insist upon the principles being a pre-condition to entitle the court to exercise its powers under r 8(2) is an attempt to lay down rules in a statute which do not exist. This in turn would mean that the court itself would be fettering a discretion entrusted to it by law and thereby preclude itself from exercising that discretion properly. …

Thirdly, he referred to the policy considerations behind the change:

> It has also been suggested that as r 8(2) empowering the court to initiate the proceeding to dismiss an action for want of prosecution is anchored on policy considerations the court is free to depart from the principles applied in *Birkett v James* [1977] 1 All ER 801…

Lastly, he referred to how r 8(2) works:

> Thus, in my opinion, the court is authorised to issue a notice to show cause when it becomes entitled to do so under r 8(2) at the expiry of the stipulated time period. The burden is then on the plaintiff to explain the reason or reasons for his inaction if he does not desire the action to be dismissed or any other order being made. If no satisfactory explanation is offered by the plaintiff for the delay it would mean that his action amounts to intentional and contumelious conduct warranting the court to act under r 8(2) (see *Toh Hock Thye & Ors v Toh Chwee Blow* [1982] 1 MLJ 152). The fact that the defendant has not been prejudiced by the delay may be raised by the plaintiff as an additional ground in support of his case. However, the fact that the delay is not inordinate is not relevant.
>
> It is our considered view the above analysis made by the learned judge sets out correctly the considerations behind a court-initiated action to a dilatory party to show cause why his claim or defence should not be struck out.

**[11]** On the scope of application of the new enlarged provision of O 34, we would refer to the case of *Sunway PMI-Pile Construction Sdn Bhd v Pembenaan Chan & Chua Sdn Bhd* [2002] 7 MLJ 538 wherein Selventhiranathan J in delivering the judgment of the High Court at p 545 said:

> The present O 34 was introduced by amendments to the RHC vide PU(A) 342/2000, which came into effect on 22 September 2000. The amendments made extensive changes to the procedure to be followed before the trial of an action. They envisage the court taking a proactive role in setting down time-frames and giving directions as to the preparation of each party's case for the purposes of the trial, while enabling the court to impose sanctions for non-compliance with those directions.

The learned judge of the High Court went on to observe about its powers of sanction under the new O 34 which includes the power to dismiss the action or defence at pp 550–551 as follows:

> Pursuant to r 3(1) 'the judge may in his absolute discretion make any order as meets the ends of justice, including striking to the action or any defence or counterclaim, or other pleading or entering judgment against the defendant…'. Similarly, as O 34 r 7 of the RHC also empowers the judge to make such order against the defaulting party as meets the ends of justice, it cannot be gainsaid that the power to be exercised pursuant thereto must include a power to order that the defence and counterclaim herein be dismissed …

**[12]** In dealing with the issue as to how the sanction of dismissal of an action is exercisable under O 34, we would refer to the judgment of Mohd Hishamudin J (as he then was) in the case of *Hong Leong Assurance Bhd v American Home Assurance Co Malaysia* [2008] 8 MLJ 547 wherein at p 552 he had this to say:

> I think it is ridiculous and an affront to the proper administration of justice for the court to grant the plaintiff the adjournment sought so that the plaintiff could comply with a direction given three years ago in 2005! There are times when courts have to be firm with litigants in order to prevent the administration of justice from falling into disrepute.

**[13]** We are in agreement with the submission of learned counsel for the defendant that the above cited decisions of the High Court under the new O 34 regime have correctly stated the applicable principle to apply to fulfill the policy and objective behind the change. We would state here that the *Birkett v James* principle is no longer suitable for the new regime under O 34.

**[14]** It should also be noted that the *Birkett v James* principle have been discarded in United Kingdom upon the coming into force in April 1999 of the new Civil Procedure Rules ('CPR'). The new CPR also put the court in the driver's seat to move the cases in court and no longer left it to the parties. The decisions of the court in the United Kingdom provide useful guidance as the CPR of April 1999 was the forerunner to the new O 34 introduced in Malaysia in September 2000. In *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926, in one of the first cases after the introduction of the new CPR, Lord Woolf observed the guiding principles under the new regime at pp 1932–1934 as follows:

> He (the judge) had to make a decision applying the principles under the CPR not under the previous regime, in deciding whether this claim should be allowed to proceed. He could not, and should not, ignore the fact that the parties previously had been acting under a different regime. The fact that they are acting under a different regime does not mean that the judge is constrained to make the same sort of decision as would be made under the previous regime.
>
> The courts have learnt, in consequence of the periods of excessive delay which took place before April 1999, *that the ability of the courts to control delay was unduly restricted by such decision asBirkett v James* [1978] AC 297. …
>
> Under the CPR the keeping to time limits laid down by the CPR or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now had to strike out a statement of case under rule 3.4 …
>
> Under the court's duty to manage cases, delays such as have occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with

circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant …

The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. *Earlier authorities are no longer generally of any relevance once the CPR applies*. (Emphasis added.)

**[15]** In the later case of *Axa Insurance Co Ltd v Swire Fraser Ltd* [2001] CP Re 17, the English Court of Appeal went on to say that the prejudice principle in *Birkett v James* is no longer a governing principle under the new CPR. The court observed as follows at p 5:

We cannot and should not consider the appeal simply on pre-CPR lines. Specifically it is no longer necessary to consider prejudice in the *Birkett v James* sense as elaborated in the many cases which followed this decision. Obviously the court will consider prejudice as part of its general inquiry as to what is just, but it will not have to seek out prejudice or ascribe it to a particular period or particular periods of delay. This exercise gave rise to endless argument and citation of authority in the pre-CPR days. We no longer have to perform it, thanks to the CPR.

**[16]** It is our judgment that under the new O 34 and particularly under r 1(3), it would require the High Court to take into account all the breaches and non-compliances by the plaintiff at the time of evaluation of its failure to progress the case before deciding whether to dismiss the action. The Court of Appeal in our view in the present case was accordingly wrong in holding that the plaintiff here could re-file and maintain the second suit in spite of holding that the first suit was rightfully dismissed for delay in failing to progress the case.

**[17]** We shall now deal with the second issue. It should be noted that even in the case of *Birkett v James* it was conceded that a second suit filed after the first suit was dismissed for breach of a peremptory order would be an abuse of the court's process and liable to be dismissed. This point was discussed fully by the English Court of Appeal in *Janov v Morris* [1981] 3 All ER 780, where the relevant principles to consider were set out in the head-notes as follows:

Where an action had been struck out on the ground of the plaintiff's disobedience of a peremptory order of the court and the plaintiff commenced a second action within the limitation period raising the same cause of action, the court had a discretion under RSC O 18 r 19(1)(d) to strike out the second action on the ground that it was an abuse of the court's process. *In exercising that discretion the court would have regard to the principle that court orders were made to be complied with. Accordingly, because there had been no explanation by the plaintiff for his failure to comply with the peremptory order made in the first action* and there was no indication that he was likely

> to comply with orders made in the second action, the commencement of the second action was an abuse of the process of the court and the court would exercise its discretion under O 18, r 19(1)(d) to strike it out … (Emphasis added.)

A critical factor for consideration is whether any explanation was offered for non-compliance with the peremptory order in the first suit. On this point Dunn LJ observed in the above cited case at p 785b as follows:

> In my view, the court should be cautious in allowing the second action to continue and should have due regard to the necessity of maintaining the principle that orders are made to be complied with and not to be ignored.

**[18]** Based on the factual circumstances of the present case we are of the view that there is clearly an abuse of the process of the court by the plaintiff in filing the second suit for the following reasons: We noted that it is conceded even by the plaintiff that it was in breach of a peremptory order to give discovery in the first suit. Both the High Court and the Court of Appeal duly noted the plaintiff's admission in this regard. The High Court observed as follows:

> It must be emphasised at the outset that the plaintiff admitted and accepted that the order of court of 31 October 2008 in the 2006 suit was in the nature of a peremptory order. There was no disputing the fact that a breach of a peremptory order was tantamount to a contumelious conduct which would invite upon the offending party the most dire of consequences, namely, even the striking out of the very action itself (see para 5 of p 71 of appeal record Vol 1).

The Court of Appeal in turn recorded the plaintiff's concession as follows:

> It is also not in dispute that the appellant conceded that the discovery order is a peremptory order (see para 7 of p 25 of appeal record Vol 1).

**[19]** We find in the present case no affidavit was filed by the plaintiff to explain the failure to comply with the discovery order or to explain the delay in progressing the case. It is of importance for an affidavit to explain non-compliance or delay be filed in order for the court to evaluate the case. It is unacceptable for the plaintiff as in the present case to give a statement from the Bar offering an explanation (see the case of *Toh Hock Thye v Toh Chwee Biow* [1982] 1 MLJ 152).

**[20]** We also find that the plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the plaintiff accepted the correctness of the decision to dismiss its suit. Further, the failure to appeal has itself been recognised as an abuse of process because the second suit would be construed as an attempt to circumvent the appeal procedure. On this point in *Lim Oh & ors v Allen & Gledhill* [2001] 3 MLJ 481, the Federal Court observed at p 486 as follows:

> Given the view which we take that there was clearly in existence a peremptory order of the court, and that the learned SAR had struck the appellants' first suit out for disobedience of that peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court …

**[21]** In the present case it is noted the Court of Appeal itself recognised that the High Court had acted rightly in striking out the first suit wherein in its judgment it had, inter alia, made a finding as follows:

> As the plaintiff did not show any cause why the first suit ought to be struck out due to non-compliance with O 34 r 2(1), the deputy registrar was of course justified in striking out the first suit. The learned High Court judge was also correct in dismissing the plaintiff's appeal in the first suit.

On the above finding of the Court of Appeal we agree with the submission of learned counsel for the defendant that the error of the Court of Appeal was in not taking the said finding through to its natural conclusion. The Court of Appeal instead drew an artificial distinction between striking out of for delay (the delay factor) and striking out for disobedience of the discovery order (the disobedience factor). The Court of Appeal seemed to say that striking out under O 34 was confined to delay in not progressing the case under r 2(1) when it said:

> However, it was manifestly clear to us that the default on the part of the plaintiff in not complying with the discovery order within the specified period of time bears no relationship to the default on the part of the plaintiff to comply with O 34 r 2(1), which was the subject matter of the notice to show cause.

**[22]** We are of the view the fundamental mistake made by the Court of Appeal was that it seemed to have ignored the terms of the discovery order wherein the first suit was stayed until discovery was given and the plaintiff could only take further steps in the suit with the leave of the court. Furthermore the plaintiff did not appeal against this discovery order and had therefore accepted its terms in full.

**[23]** It is therefore clear that the discovery order had made the progress of the first suit conditional upon the plaintiff giving discovery. The Court of Appeal failed to appreciate this fact and therefore drew an artificial distinction between the delay factor and the disobedience factor. It is our considered view that on this mistake alone the judgment of the Court of Appeal cannot stand.

**[24]** It is our judgment that the Court of Appeal was clearly wrong in taking

the restricted view of the High Court's jurisdiction under O 34. Once the High Court is seized with jurisdiction under O 34 it will be required to consider all the factors causing delay. On the facts of the present case we are compelled to hold that the continuing breach of the peremptory order to give discovery resulted in the action remaining stagnant and not progressing.

**[25]** Learned counsel for the plaintiff relied on the case of *Pembinaan dan Pemaju Mahajiwa (Selangor) Sdn Bhd v ASM Development Sdn Bhd (formerly known as Sobena Maju Sdn Bhd)* [2003] 4 MLJ 633; [2003] 4 CLJ 213 to support his contention that it is not in all cases of a breach of a peremptory court order that the discretion should be exercised in favour of striking out the first suit. The plaintiff will only be prevented from filing a second action within the limitation period if the first action was struck out for intentional and contumelious default. With respect we could not agree. We find that the said case can be distinguished on the facts from the present case. In the said case the Federal Court observed that the first suit was struck out because of want of authority on the part of the solicitors to bring the action. The Federal Court expressly held that the plaintiff was not in breach of the peremptory order to give discovery of the resolution in the minute book because discovery was in fact given but that the defendant wanted more in terms of inspection of whole minute book wherein Federal Court observed at pp 644 (MLJ); 226 (CLJ) as follows:

> The sole ground of the application was that the suit was filed without the authority of the appellant's board of directors. The resolution was produced. Certainly the respondent should not be allowed to have access to other unrelated information of the appellant under the pretext of verifying the veracity of the resolution.

Accordingly the Federal Court held there was no breach of a peremptory order in the first suit and the second suit was therefore not an abuse of the process of the court.

**[26]** It is not in dispute in the present case that the discovery order in the first suit was a peremptory order and that the plaintiff had not complied with the order but proceeded nevertheless to file the second suit in identical terms. This, in our view, is clearly an abuse of the process of the court and ought to be struck out.

## CONCLUSION

**[27]** For the reasons abovestated we would answer question 1 in the negative, question 2 in the positive and questions 3 and 4 in the negative. In the result we allow this appeal with costs. The order of the Court of Appeal is set aside and

the order of the High Court is hereby restored. We award a sum of RM25,000 to the appellant as costs before this court and the Court of Appeal. The deposit is to be refunded to the appellant.

*Appeal allowed with costs.*

Reported by Ibnu Aswan